National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: January 23, 2003

TO: Robert H. Miller, Regional Director; Joseph P. Norelli, Regional Attorney; Timothy W. Peck, Assistant to Regional Director, Region 20

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Stonegate Construction, Inc., Case 20-CA-30724-2

512-5009-6700512-5012-8300, 512-5012-8400, 512-5066-6300, 512-5072-0200, 512-5072-0400

This case was submitted for advice as to whether a general contractor unlawfully denied a non-employee Union representative access to its jobsite and caused the representative's arrest where access to the jobsite was subject to certain restrictions. The charge should be dismissed, absent withdrawal, because the Union representative refused to comply with certain restrictions on access and therefore the Employer did not unlawfully cause the arrest of the Union representative.

FACTS

Stonegate Construction, Inc. (Employer) is a general contractor on a jobsite in Roseville, California where it is constructing a three-story office building. F. Rodgers Interior Insulation, an insulation company, and Sunbelt Rentals, a scaffold erection company, are two subcontractors on the project. Both of these subcontractors are signatory to the 46 Northern California Counties Carpenters Master Agreement (Agreement), effective August 1, 1999 through June 30, 2004. Section 13 of the Agreement states:

"Union representatives shall be permitted at all times upon any place or location where any work covered by this Agreement is being, has been or will be performed. Where there are visitation restrictions imposed at the jobsite by entities other than the individual employer, the individual employer will use his best efforts to provide access to the site by the Union representative."

On February 25, 2002,1 Union representative Brodsky and approximately seven individuals picketed outside the Employer's jobsite.2 Brodsky entered the jobsite, and approached Employer general superintendent Fasolo to inform him that he was seeking access to conduct a safety check and perform other lawful activities under the Act. Fasolo responded that Brodsky could not enter the jobsite while employees were working, and that he was going to call the police to have Brodsky arrested. Fasolo also directed an unidentified employee to follow Brodsky and throw him off of the jobsite. Fasolo called the police. Brodsky continued the safety walk for 20 minutes. He found no employees of signatory contractors on the jobsite, but told Fasolo that the insulators would return to complete the work, and that the scaffolding was still erect. When Brodsky left the jobsite, a policeman arrested him in the Employer's parking lot.

The Employer maintains a number of restrictions on access. The front gate of the jobsite is posted with a sign stating that all visitors must check-in with a field superintendent at the front gate before coming onto the property. On November 12, 2001, the Employer informed the Union in writing that it would grant access only if the Union arranged an appointment at least 48 hours in advance, and that if no advance approval is given, the Employer would consider Union representatives trespassers. Last, as noted above, on February 25, Fasolo informed Brodsky that he could not gain access to the jobsite while employees were working.3 The Region has concluded that Brodsky effectively complied with the posted check-in requirement by notifying Fasolo, the general superintendent, that he sought access. There is no evidence that Brodsky complied with the other restrictions.

ACTION

We conclude that, absent withdrawal, the Region should dismiss the Section 8(a)(1) charge alleging that the Employer

unlawfully denied Union representative Brodsky access to its jobsite because Brodsky failed to adhere to the Employer's time, place, and manner restrictions under California law. First, we concluded that the Employer's 48-hour prior notice requirement is a valid exercise of its property right because it is similar to a requirement that visitors to an employer's property identify themselves in advance, which is valid under California state law. Second, since California has not yet determined whether an employer may lawfully allow access only to times when employees are not working, we can not say that the Employer was not reasonable in asserting such a right. Last, although it appears that California courts would find invalid a requirement that an employer must pre-approve access by a union representative, we need not determine the lawfulness of this restriction because the Union failed to comply with the other lawful restrictions.

I.The Union's right of access under Board law and the "invitee" concept.

In a series of cases, the Board has applied a Babcock4 balancing test to analyze whether a general contractor may deny union officials access to a jobsite when employees of a subcontractor performing work on the jobsite are represented by that union. In those cases, the collective bargaining agreements between the unions and the subcontractors contained provisions granting the unions unrestricted access to the signatory employer's property.5 In those circumstances, the Board will find that a non-signatory general contractor is obligated to allow the union access to its jobsite. In CDK Contracting Co., the Board explained that the employer, "by soliciting other employers to perform work at the jobsite, 'invited' subcontractors, and their respective subcontractors, onto the jobsite, and thus subjected its 'property rights' to the [u]nion's contractual 'access' rights with those subcontractors."6 However, the Board has not found a statutory right of access to a non-signatory general contractor's jobsite where an access clause allows for a broad limitation of union access rights.7

Here, the first clause of Section 13 of the Agreement allowing for access "at all times" grants the Union unlimited access onto the Employer's jobsite. The second clause limits that access to the extent that employers not signatory to the Agreement impose their own restrictions. Unlike the Board cases above, where the contracts granted virtually unrestricted broad rights of access, here the Union's right of access is broadly restricted by the Employer's right under the contract to impose limitations on access. Thus, although the second clause is not a complete waiver of the Union's access rights, it is an acknowledgement by the Union that the Employer may impose visitation restrictions.8 In these circumstances, where the Employer "subjected" its property rights only to the extent a signatory employer can help the Union overcome Employer restrictions, we would not consider the Union to be an "invitee" of the Employer as the Board construes that term.9

II. Access rights based on California labor law and policy

Since, under Board law, the Union is not an unrestricted invitee on the Employer's property, we must look to state law to determine the nature of the Employer's property interest and its right to exclude or limit the Union's entry onto its premises.10 California defines civil trespass as "an 'unauthorized entry' onto the land of another," regardless of motivation.11 Under California law, however, state labor law and policy limit private property interests.12

In Sears, the California Supreme Court held that, under the Moscone Act (Cal. Code of Civ. Proc. § 527.3), the employer could not evict union pickets from the privately-owned sidewalk surrounding its store.13 The court found that, independent of any constitutional right, the State of California could permit union activity on private property as a matter of state labor law.14 The court interpreted the Moscone Act as insulating from the court's injunctive power all union activity declared to be lawful under prior California decisions.15 Because Schwartz-Torrance16 and In Re Lane17 had established the legality of peaceful union picketing on private sidewalks outside a store, the court concluded that the State Legislature had now codified this rule into its labor statutes.18

Apart from union activity outside a store, California has also weighed private property interests against labor interests at private construction sites. In In Re Catalano,19 the court held that nonemployee union representatives who entered a private construction site to conduct a safety inspection and prepare a shop steward's report were covered by the "lawful union activity" exception to the criminal trespass statute.20 In finding "lawful union activity," the court balanced the respective interests of the union and the property owner.21 Striking the balance in favor of the union activity, the court emphasized the union's collectively bargained right to conduct certain activities on the premises, the industry custom of permitting such entries, and the strong public interest in maintaining a safe workplace, particularly in dangerous industries.22

Inasmuch as state law is the basis for the Employer's obligation to grant access, it is appropriate to look to California time, place, and manner restriction cases, which analyzes the legality of an employer's restrictions on access, to define the scope of the employer's property interest. The Board in Glendale Associates, Ltd. stated that "[o]nce the Respondents establish a legitimate time, place, and manner restriction pursuant to state law, then 'the law that creates and defines the employer's property rights' allows them to exclude the non-complying individual or party."23

Thus, because an employer may place restrictions consistent with state law, we consider whether and to what extent time, place, and manner restrictions may be imposed on union activity protected under the Moscone Act. In construing that statute, California has found unprotected only conduct that implicated union violence and obstruction.24 In analogous analysis under the California state Constitution, however, California state courts have suggested that reasonable time, place, and manner restrictions are legitimate.25 They have held that an employer may lawfully condition access on a union's furnishing in advance information identifying the individuals seeking to conduct organizational activities on an employer's property.26 The California courts have also held that an employer may lawfully require prior submission of a union's expressive materials, such as posters or signs, so long as the criteria is objective and seeks only to regulate components of the materials like style and the use of certain kinds of language.27 However, the California courts found unlawful a similar condition requiring prior approval when it failed to "provide definite, objective written guidelines for the exercise of discretion."28 The court held that this regulation of expression impermissibly gave the employer unfettered discretion to determine which messages to permit based on their content.29

California state law has not yet defined whether or to what extent it would permit a restriction limiting access to a jobsite only to times when employees are not working.

III.Application of California law to the Employer's limitations on access

Here, unlike in Catalano, the Employer did not flatly deny the Union access to its jobsite on February 25. Instead, it conditioned access on certain restrictions, many of which were previously known to the Union. Thus, we need to determine whether the Employer could lawfully eject Brodsky because he failed to comply with those restrictions. As noted above, the legality of these restrictions must be analyzed under California time, place, and manner precedent.

First, we conclude that, as in UNITE and H-CHH Associates, above, the 48-hour notice requirement was lawful as a reasonably limited means of determining, for liability purposes, the identity of those seeking access to the Employer's property. Second, we are not prepared to conclude that the Employer's restriction on Union access to the jobsite when employees are working is unlawful. As noted above, the California courts have not yet delineated the lawfulness of this time, place, and manner restriction. Because the issue is open under California law, and nothing in Board law prohibits reasonable restrictions in the context of contractual access,30 we would not venture to limit the scope of the Employer's property interest more than state law currently does.31

Third, it appears that the requirement that the Employer pre-approve any Union visitor to the property would be unlawful under California law. This condition is similar to the restriction in H-CHH Associates that granted unfettered discretion to the Employer to decide which expressive materials to allow.32 As there, the Employer here did not specify any objective criteria it would use to approve Union access, such as prohibiting access only to Union representatives who have previously caused damage or violence. Since this restriction would not be lawful under California state law, we would normally view it as an unlawful restriction of access under Section 8(a)(1). However, in the circumstances of this case, we would not issue complaint on that one, arguably unlawful restriction. Since the Union failed to comply with the Employer's other lawful restrictions, the Employer was privileged to deny Brodsky access to the jobsite.

IV.Citizen's Arrest of Brodsky

As described above, on February 25, Fasolo called the police and caused a citizen's arrest of Brodsky. The local district attorney's office later dropped the charge "in the interest of justice." Since, in our view, the Employer had a reasonable basis for denying Brodsky access to the jobsite, we conclude that the arrest did not violate Section 8(a)(1) of the Act.

In Johnson & Hardin Co.,33 the Board held that it would view a criminal trespass complaint under the same standard for

determining whether a civil lawsuit violates Section 8(a)(1).34 Before the Supreme Court's recent decision in BE&K Construction Co. v. NLRB,35 the Board used different standards for determining whether a civil lawsuit violates the Act, depending on whether the suit was ongoing or concluded. The Board followed the directives of Bill Johnson's Restaurants.36 In that case, the Court held that the Board may find the prosecution of an ongoing lawsuit unlawful if the suit lacks a reasonable basis in fact or law and was brought for a retaliatory motive.37 As to concluded suits, the Court explained that if the concluded proceedings result in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit, then the Board could proceed to find a violation if the suit was filed with a retaliatory motive.38 In determining whether the suit had been filed in retaliation for the exercise of employees' Section 7 rights, the Board could take into account that the suit lacked merit, and that the suit attacked what the Board determined to be protected conduct.39

BE & K Construction Co. involved a completed lawsuit. Applying the "concluded suit" standard of Bill Johnson's, the Board found the suit was "unmeritorious" since all of the petitioner's claims were rejected by the district court on the merits, or were voluntarily withdrawn with prejudice.40 The Supreme Court, however, explained that a finding that a suit is non-meritorious is insufficient because it may be reasonably based even though it is ultimately unsuccessful. And, the prosecution of a reasonably based suit implicates First Amendment concerns. Although the suit may attack activity that is ultimately determined to be protected, the suit nevertheless enjoys First Amendment protection if the plaintiff reasonably believes the conduct is unprotected and illegal.41 Similarly, the Court reasoned that inferring a retaliatory motive from evidence of animus would condemn genuine petitioning in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal."42 For the Court, then, the Board's retaliatory motive standard incorrectly "broadly cover[ed] a substantial amount of genuine petitioning."43 The Court left open whether any other showing of retaliatory motive could suffice to condemn a reasonably based, but unsuccessful suit. It intimated that suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for protected activity, may be unlawful.44

Here, the arrest of Brodsky is akin to a "concluded non-meritorious suit" because the local district attorney dismissed the charge of criminal trespass "in the interest of justice." Under BE & K, however, the reasonableness of the action, as well as its ultimate disposition, is significant. Because there was no airing of evidence or decision on the merits, we cannot take the dismissal as demonstrating the arrest lacked a reasonable basis. In any event, we would not argue that Fasolo lacked a reasonable basis for causing the arrest because, as we discussed above, Brodsky refused to comply with lawful restrictions the Employer placed on access, and Fasolo was reasonably based in his belief that the Employer's restrictions conformed to California law.

We also conclude that the Employer did not cause the citizen's arrest with an unlawful retaliatory motive. There is no evidence that the Employer lacked a genuine desire to eject the Union field representatives from the jobsite, and to stop conduct that it correctly believed was illegal.

Our conclusion that there is no merit to this charge does not leave the Union without a remedy. The Union has a right to challenge the denial of access under California law by filing a civil suit to determine the lawfulness of the Employer's time, place, and manner restrictions under the Moscone Act.

In sum, because the Employer had a reasonable basis for causing Brodsky's arrest, and the arrest was not clearly retaliatory under BE & K, we conclude that the Employer did not violate Section 8(a)(1) of the Act by causing a citizen's arrest of Brodsky.

For the reasons set forth above, we recommend, absent settlement, dismissal of the charge.

B.J.K.

---

1 All dates are in year 2002, unless otherwise noted.

2 Brodsky had sought access on three other occasions between November 11, 2001 and February 25. The Employer refused to grant access on each of these occasions. The Union did not allege these denials of access as violations, and, in any event, the

Region has decided not to issue complaint on these prior incidents because they are time barred by Section 10(b) of the Act.

3 The Employer also claims that it told the Union on a number of prior occasions that it may not come onto the jobsite while employees are working.

4 NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956).

5 See Villa Avila, 253 NLRB 76, 81 (1980), enfd. as modified 673 F.2d 281 (9th Cir. 1982) (two of three relevant contracts allowed for access on any job where union members worked, and the third contract allowed for access during working hours and stated that union representatives shall make every reasonable effort to advise the employer of their presence on this project; ALJ construed clauses as granting "unrestricted" access); see also CDK Contracting Co., 308 NLRB 1117, 1117 n.3 (1992) (union representatives permitted on property if they "make their presence known" to employer and do not unnecessarily interfere with or cause employees to neglect their work); C.E. Wylie Construction Co., 295 NLRB 1050, 1052 (1989), enfd. 934 F.2d 235 (9th Cir. 1991) (access allowed at any job at any reasonable time where workmen are employed under contract's terms).

6 CDK Contracting Co., 308 NLRB at 1117.

7 See C.E. Wylie Construction Co. v. NLRB, 934 F.2d 234 (existence of access clause lended "further support" to granting union access).

8 As discussed below, under California law, in cases where a union seeks access for lawful reasons, an employer may still place lawful restrictions on that access.

9 See CDK Contracting Co., 308 NLRB at 1117 (emphasizing importance of a contractual access clause); Villa Avila, 253 NLRB at 81 (referring to union's "unrestricted" right of access).

10 See Bristol Farms, 311 NLRB 437, 438-439 (1993); see also Wolgast Corp., 334 NLRB No. 31, slip. op. at 1 n.4 (2001), citing R&R Plaster & Drywall Co., 330 NLRB 87, 88 (1999), and Indio Grocery Outlet, 323 NLRB 1138, 1141 (1997), enfd. 187 F.3d 1080, 1095 (9th Cir. 1999) (analyzing employers' property interest under state law).

11 Civic Western Corp. v. Zila Industries, Inc., 135 Cal.Rptr. 915, 925 (Cal. App. 2 Dist. 1977).

12 Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370 (1979), cert. denied 447 U.S. 935 (1980). California state constitutional freedom of speech guarantees also limit property interests. See Robins v. Pruneyard, 153 Cal.Rptr. 854 (1979), affd. 557 U.S. 74 (1980).

13 Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. at 381.

14 The court noted Robins v. Pruneyard, recently decided, and said that:

The Robins decision rests on provisions of the California Constitution. In the instant case, our decision rests on the terms of Code of Civil Procedure Section 527.3; accordingly, we express no opinion on whether the California Constitution protects the picketing here at issue.

15 Sears, 158 Cal.Rptr. at 375-376.

16 Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers Union, 40 Cal.Rptr. 233 (1964), cert. denied 380 U.S. 906 (1965) (reversing injunction of union picketing on privately owned sidewalk outside bakery involved in labor dispute).

17 In Re Lane, 79 Cal.Rptr. 729 (1969) (reversing trespass conviction of union representative who handbilled on privately owned sidewalk outside supermarket involved in labor dispute).

18 Sears, 158 Cal.Rptr. at 379.

19 In Re Catalano, 171 Cal.Rptr. 667 (1981).

20 See Cal. Penal Code § 552.1. We note that although In Re Catalano was decided after Sears, it was not a Moscone Act (injunction) case. Rather, it was a habeas corpus case overturning the criminal trespass convictions of two union representatives.

21 In Re Catalano, 171 Cal.Rptr. at 676-677.

22 Id.

23 See Glendale Associates, Ltd., 335 NLRB No. 8, slip. op. at 3 n.12 (2001) (rejecting the balancing of an employer's property interest with a union's Section 7 right of access to determine the lawfulness of a rule requiring advance notice of a visit).

24 As stated, the Moscone Act's protection does not extend to conduct involving "violence or breach of the peace," Cal. Civ. Proc. Sec. 527.3(b)(1), or involving "disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity." Cal. Civ.Proc. Sec. 527.3(e). See Kaplan's Fruit & Produce Co. v. Superior Ct., 160 Cal.Rptr. 745, 747 (Cal. 1979) (picketing which obstructs access is not "peaceful" picketing protected by the Moscone Act); M Restaurants, Inc. v. San Francisco Local Joint Executive Board of Culinary Workers, 177 Cal.Rptr. 690, 693-694, 701-703 (Cal. Ct. App. 1 Dist. 1981) (upholding injunction limiting number and location of pickets where union obstructed access to restaurant and threatened/intimidated customers); Int'l Molders and Allied Workers v. Superior Court, 138 Cal.Rptr. 794, 800 (Cal. Ct. App. 3 Dist. 1977) (upholding injunction limiting number and location of pickets where union engaged in threats of violence and interference with access).

25 Pruneyard, 153 Cal.Rptr. at 860-861 (reasonable time, place, and manner regulations permissible; those wishing to publish their ideas do not have "free rein" as to the time, place, or manner). See Glendale Associates, 335 NLRB No. 8, slip op. at 2 & n.7 (time, place, and manner restrictions applicable).

26 See, e.g., UNITE v. Superior Court of Los Angeles County (Taubman Co.), 65 Cal. Rptr. 2d 838, 853-854 (1997) (advance identification of individuals entering employer's property lawful because it provided a reasonably limited means of determining the location and identity of the applicant if the employer needed to pursue a liability claim); H-CHH Associates v. Citizens for Representative Government, 238 Cal. Rptr. 841, 852 (Cal. App. 2 Dist. 1987) (same). See also Glendale Associates, Ltd., 335 NLRB No. 8, slip. op. at 2 (rule requiring advance notice of prospective handbillers is consistent with time, place, and manner restrictions under California law).

27 See UNITE, 65 Cal. Rptr. 2d 838, 844, 850-851 (objective criteria lawfully imposed included requirement that posters shall be two-dimensional, neat, compatible with general aesthetics of the mall, and contain no obscene or fighting words).

28 H-CHH Associates, 238 Cal. Rptr. at 852.

29 See id. (invalidating rule permitting shopping center to reject activity that would "adversely affect the shopping center environment atmosphere or image").

30 At least one ALJ has found a general contractor legitimately denied union agents access, notwithstanding a clause that permitted access "during working hours," where access at the time requested would have interfered with a cement pour and the union agents were invited to return at a later time. Subbiondo and Associates, Inc., 295 NLRB 1108, 1115-1116 (1989).

31 We would not infer that the Employer also maintains an escort requirement from Fasolo's instruction that an unidentified employee follow Brodsky in an attempt to eject him from the jobsite.

32 H-CHH Associates, 238 Cal. Rptr. 841 (Cal. App. 2 Dist 1987).

33 305 NLRB 690, 691 (1991), enfd. in relevant part 49 F.3d 237 (6th Cir. 1995).

34 We note that in Urban Retail Properties Co., JD(SF) 39-99, 1999 WL 33454754, at 10-11 (NLRB Division of Judges), the ALJ found that a citizen's arrest is indistinguishable from the swearing out of a criminal complaint, as in Johnson & Hardin Co., or the filing of a civil complaint because "all three effectively petition for government action to redress exactly the same type of grievance." This reasoning is consistent with the Supreme Court's observation in BE & K Construction Co. that "the right to petition extends to all departments of the Government." 122 S. Ct. at 2396.

35 122 S. Ct. 2390 (2002).

36 461 U.S. 731 (1983).

37 Id. at 742-743.

38 Id. at 747, 749.

39 Id. at 747.

40 329 NLRB 717, 722-723 (1999).

41 122 S. Ct. at 2399-2401, citing Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993) (suit may be condemned as anti-trust violation only if it is objectively baseless, in the sense that no reasonable litigant could realistically expect success on the merits, and it is subjectively a sham attempt to use government process - as opposed to the outcome of the process - as an anti-competitive weapon).

42 Id. at 2401 (emphasis in original).

43 Id. at 2400.

44 Id. at 2402.